

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL S. HARALSON**

Claimant

VS.

**ACE HARDWARE**

Respondent

AND

**UNITED STATES FIDELITY &  
GUARANTY CO.**

Insurance Carrier

Docket No. 1,036,340

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the January 28, 2008, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an injury from an accident that arose out of and in the course of his employment with respondent and that respondent had proper notice of the claim. Respondent was ordered to provide claimant with an authorized physician, pay medical expenses incurred by claimant, and pay temporary total and temporary partial disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 18, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

Respondent argues that claimant has failed to meet his burden of proof that his alleged injury arose out of and in the course of his employment. Although respondent argued lack of timely notice at the preliminary hearing, this issue was not appealed.

Claimant argues that he met his burden of proof that his injury arose out of and in the course of his employment with respondent. Claimant contends that respondent's request for review should be dismissed or, in the alternative, the order of the ALJ be affirmed.

The issue for the Board's review is: Did claimant sustain a personal injury by accident that arose out of and in the course of his employment with respondent?

### FINDINGS OF FACT

Claimant began working for respondent on June 6, 2007. On June 17, 2007, he was loading 20 bags of water softener salt into a customer's truck when he suffered an injury to his back. He notified Alice Bateson, respondent's assistant manager, that he had hurt his back. He worked a few days after the accident and was then seen by a chiropractor, Dr. Marcus Deaver, who referred him to an orthopedic surgeon, Dr. Gerard Librodo. The history recorded by Dr. Librodo in his Progress Notes on June 28, 2007, is that claimant "noted sudden severe low back pain with radiation down bilateral lower extremities a few weeks ago after lifting repeatedly at work."<sup>1</sup> Dr. Librodo ordered an MRI, which showed that claimant had a large herniated disk at L4-5. Claimant was given work restrictions of no lifting, carrying, pushing, pulling, bending, twisting, kneeling, overhead reaching, climbing, or use of ladders. He is only supposed to stand for one-third to two-thirds of a day. Claimant gave the restrictions to respondent's store manager, Craig Lorenson, and was told that respondent had no work for him within those restrictions. Claimant was off work until August 19, 2007, when he returned to work part time with respondent, working an average of 15 hours per week.

Mr. Lorenson testified that as far as he knew, no water softener salt was sold in the store on June 17, 2007. When product is scanned into the cash register, it has a code. According to the store's computers, water softener salt was sold on June 1, June 6 and June 10. Mr. Lorenson also testified, however, that a sale could be run up as general merchandise. If that happened, the product is not going to be identified in the computer system. Mr. Lorenson said that cashiers are encouraged to scan the items so they can be recorded but acknowledged that from time to time, items are rung up as general merchandise. He said that only one customer, Towns Edge Car Wash, usually purchases bags of water softener salt in large quantities. That customer purchased 20 bags of water

---

<sup>1</sup> P.H. Trans., Cl. Ex. 1 at 1.

softener salt on June 10, 2007. Mr. Lorensen acknowledged that cash sales are recorded differently than transactions that are billed through respondent's in-house credit accounts and, therefore, some cash sales would not appear in its computer print out. Mr. Lorensen has not gone back to determine from an inventory how many bags of water softener were actually sold in June 2007.

### **PRINCIPLES OF LAW**

K.S.A. 2007 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>2</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>4</sup>

---

<sup>2</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>3</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>4</sup> K.S.A. 2007 Supp. 44-555c(k).

**ANALYSIS**

Simply put, this claim comes down to whether claimant's injury occurred at work. It is a factual, not a legal, dispute. It could be characterized as a question of credibility. Respondent seems to be contending that there is no way that 20 bags of water softener were sold on June 17, 2007, the alleged date of accident. But the testimony shows that is not necessarily the case. The water softener could have been sold on that date and entered as general merchandise rather than by the bar codes being scanned. Furthermore, it appears that claimant is not positive about the date of his accident. The medical records are vague about the accident date, but not about the injury happening at work. Respondent also points out that it is unusual for that many bags of water softener to be sold to a single customer. The only regular customer that purchases water softener in that quantity had already made a purchase just a week before claimant's alleged date of accident. However, this circumstantial evidence does not directly contradict claimant's testimony.

**CONCLUSION**

Based on the record presented to date, claimant has met his burden of proving that he suffered personal injury by an accident that arose out of and in the course of his employment with respondent.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 28, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2008.

\_\_\_\_\_  
HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Katie M. Black, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge